ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-152
	)	
Telemessaging, Electronic Publishing, and	)	
Alarm Monitoring Services	)	

COMMENTS OF BELL ATLANTIC

The Bell Atlantic Telephone Companies

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September 4, 1996

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COMMENTS OF BELL ATLANTIC[1]

I. Introduction and Summary

The provisions of Sections 260, 274 and 275 of the 1996 Act are largely self-executing.[2] Except for certain accounting provisions, which are being addressed separately,[3] the statute on its face requires no separate rules. Moreover, except for a few limited areas, many of which are being addressed in separate joint comments that Bell Atlantic is filing with the Newspaper Association of America ("Joint Filing"), the provisions of these three sections require little clarification. The Notice in this proceeding,[4] however, contains a number of questions and,

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] 47 U.S.C. §§ 260, 274, 275.

[3] ***Accounting Safeguards for Common Carriers Under the Telecommunications Act of 1996***, CC Docket No. 96-150, FCC 96-309 (rel. July 18, 1996).

[4] ***Notice of Proposed Rulemaking***, FCC 96-310 (rel. July 18, 1996) ("Notice").

in a few instances, includes tentative conclusions that are inconsistent with the statute. Bell Atlantic discusses herein many of the questions and tentative conclusions contained in the Notice.

II. The 1996 Act Does Not Change the Scope of the Commission's Authority.

The Commission asks whether the 1996 Act gives it jurisdiction over intrastate, or intraLATA, information services, or whether its authority is limited to interstate, or interLATA, information services.[5] The scope of the Commission's authority over information services, including telemessaging and electronic publishing services, has been extensively litigated in the Computer Inquiry III remand proceeding[6] and in the U.S. Court of Appeals.[7] In those proceedings, conducted prior to enactment of the 1996 Act, the Commission, affirmed by the courts, found that it had jurisdiction over enhanced services[8] that involve interstate communications or inseparably mixed interstate-intrastate communications.[9] Enhanced services

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[5] ***See id.*** at ¶¶ 19-27.

[6] ***See, e.g., Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards***, 6 FCC Rcd 7571, 7617-25 (1991).

[7] ***California v. FCC***, 39 F.3d 919 (9th Cir. 1994) ("California III"), cert denied, 115 S.Ct. 1427 (1995).

[8] The definition of enhanced services contained in 47 C.F.R. § 64.702(a) and that of information services in 47 U.S.C. § 154(20) are generally co-extensive, except that the latter does not include protocol processing.

[9] California III at 930-31.

that involve exclusively intrastate communications, or any segregable intrastate portions of mixed jurisdiction services, are subject to state authority.

The 1996 Act does not change this jurisdictional finding. Although it introduces the concept of Local Access and Transport ("LATA") into the statute, the new provisions do not modify the limitations on the Commission's authority contained in Section 2(b) of the 1934 Act[10] which based jurisdiction on the interstate or intrastate nature of the communications. Nor does anything in either Section 260, relating to telemessaging,[11] or section 274, which addresses electronic publishing,[12] either explicitly or by implication broaden the scope of the Commission's authority.[13]

There is, therefore, no need to revisit the scope of the Commission's authority over telemessaging. If the service involves exclusively interstate messages or mixed interstate/intrastate messages that cannot be separated and regulated by different entities,[14] the Commission has jurisdiction.

Similarly, in determining the regulatory jurisdiction over an electronic publishing service, it is necessary to examine the locations of the originator and intended recipient(s) of the

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[10] 47 U.S.C. § 152(b).

[11] 47 U.S.C. § 260.

[12] 47 U.S.C. § 274.

[13] Accordingly, to the extent that a statutory provision addresses a purely intrastate telemessaging or electronic publishing service, the state commission would exercise jurisdiction to enforce that provision.

[14] Whether a message is interstate or intrastate is measured from the origination of the call to its delivery to the intended recipient.

communication. If the electronic publishing service is received in one or more states other than the state from which they are sent, and if the interstate and intrastate aspects of the service cannot be separated, as will almost always be the case, the Commission has jurisdiction.

Even where a strictly intrastate electronic publishing service is under a state commission's jurisdiction, however, that commission is bound by the provisions of the 1996 Act. In fact, the one provision of Section 274 that contemplates the adoption of implementing regulations, Section 274(b)(4) (relating to asset transfers and transactions), makes clear that the Commission and the states are each bound by the Act and may each prescribe regulations relating to matters under their respective jurisdictions.[15] As a result, while state commissions have jurisdiction over wholly intrastate electronic publishing services, they may not promulgate regulations that are inconsistent with that statute.[16]

III. Statutory Provisions Relating to Electronic Publishing Are Largely Self-Executing.

The provisions contained in Section 274 are detailed and, for the most part, clear and explicit. With a few exceptions, they are self-executing and require no Commission rules or

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[15] ***See*** 47 U.S.C. §274(b)(4). ***See also Louisiana Public Service Comm'n v. U.S.***, 476 U.S. 355 (1986),

[16] For example, a state may not prohibit a Bell operating company from providing promotion, marketing, sales, or advertising services to an electronic publishing joint venture in contravention of Section 274(c)(2)(C), which permits such activities.

clarification.[17] There are, however, a few instances where clarification is warranted. For example, although the definition of electronic publishing is clear, Commission clarification of the full scope of one of the exceptions would be appropriate.[18] As discussed in the Joint Filing, the Commission should clarify that introductory material in an Internet access service would constitute a "gateway" under Section 274(h)(2)(C) even if it includes links to specific websites, recommendations, and advertising.

The Commission should also confirm that, where Congress stated that restrictions apply to separate affiliates, it did not intend that they would apply to electronic publishing joint ventures as well unless their application to such ventures is specified. For example, the provisions of Section 274(b)(5) relating to officers, directors, employees and property in common; those of Section 274(b)(7) that prohibit a Bell operating company ("BOC") from performing hiring of personnel, purchasing, installation, or maintenance of equipment, and engaging in research and development for a separate affiliate; and those of Section 274(c)(1) restricting joint marketing, are inapplicable to electronic publishing joint ventures.[19]

The statutory language that requires a BOC and its electronic publishing affiliate or joint venture to be "operated independently" from the BOC is a general policy statement, not a separate substantive restriction.[20] This language is the same as that used in the Commission's

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[17] The Joint Filing addresses a few areas in which Commission clarification would be appropriate.

[18] ***See*** Notice at ¶ 31.

[19] ***See id.*** at ¶¶ 39, 44.

[20] ***See id.*** at ¶ 35.

own Computer Inquiry II[21] and cellular separation rules,[22] neither of which includes any additional regulations to explain or implement that policy. Instead, Section 274's requirement for independent operation is merely a general statement of the intent of Congress that is given effect in the nine specific requirements and restrictions on the relationship between the BOC and its electronic publishing separate affiliate and/or joint venture that follow.

The Commission also asks whether providing telephone service to a separate affiliate constitutes purchasing, installation, or maintenance of equipment in contravention of Section 274(b)(7)(B).[23] The Commission should differentiate provision of a service that uses equipment owned by the BOC, an arrangement specifically permitted under this subsection, from the purchasing, installation and maintenance of equipment "on behalf of" the affiliate, which is barred. In the latter situation, the equipment itself would be owned by the separate affiliate. In the former, the BOC owns the equipment and uses it to provide a service to the affiliate.

Similarly, the Commission should differentiate between research and development that is performed specifically on behalf of a separate affiliate from research and development that has broader application.[24] Only the former is prohibited under Section 274(b)(7)(C). There is no basis to read the statute to prohibit a BOC from undertaking research and development for its own operations. If such research and development happens also to

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[21] 47 C.F.R. § 64.702(c)(2).

[22] 47 C.F.R. § 22.903(b).

[23] Notice at ¶ 45.

[24] ***See id.*** at ¶ 46.

benefit the affiliate, the results of that research may be shared with the affiliate pursuant to written agreement that is filed with the Commission and made publicly available, as contemplated in the statute.[25]

A BOC should be permitted to engage in activities permitted under both Section 272 and 274 through the same separate affiliate.[26] In that event, any combined activities would be subject to the restrictions contained in both sections, to the extent those restrictions differ. Separable activities within the same affiliate would, where feasible, be subject only to the section of the statute addressing each activity.

IV. The Joint Marketing Restrictions Apply Only to an Electronic Publishing Separate Affiliate, Not A Joint Venture.

Although the Act imposes interim limitations on the ability of the BOCs to jointly market electronic publishing services with other entities,[27] it also creates express exceptions. In particular, under Section 274, a BOC is expressly permitted to provide promotion, marketing, sales, and advertising services to an electronic publishing joint venture[28] and inbound telemarketing and referral services to a separated electronic publishing affiliate, an electronic

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[25] ***See*** 47 U.S.C. § 274(b)(3)(B).

[26] ***See*** Notice at ¶ 48.

[27] ***See*** 47 U.S.C. § 274(c)(1). These interim provisions sunset four years after enactment of the 1996 Act. 47 U.S.C. § 274(g)(2).

[28] 47 U.S.C. § 274(c)(2)(C).

publishing joint venture, an affiliate, or an unaffiliated electronic publisher.[29] The Act cannot here be interpreted in a way that would narrow the explicit authority granted by Congress.

For example, the Notice asks for comment on the proper interpretation of yet another provision, Section 274(c)(1)(B) That subsection limits the range of permitted joint marketing activities with an "affiliate that is related to the provision of electronic publishing,"[30] and the Notice asks how that provision differs from the preceding subsection that limits joint marketing with a "separated affiliate," Section 274(c)(1)(A), and whether it in some way modifies the express authority contained in Section 274(c)(2)(C) for a BOC to provide marketing services to an electronic publishing joint venture.[31] Section 274(c)(1)(B) can reasonably be read only to limit the BOC's right to engage in joint marketing of electronic publishing with an affiliate that is established for another purpose where that affiliate has an interest or claim to royalties in the electronic publishing that is below the ten per cent threshold that constitutes ownership under this section.[32] It cannot be read, however, to narrow in any way the joint marketing authority granted in succeeding provisions relating specifically to joint ventures.

Similarly, the other sections the Commission cites that preclude use of a BOC's name, trademark, or service marks, or that prescribe the conditions on inbound telemarketing, do not affect the right of a BOC to provide marketing services for an electronic publishing joint

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[29] 47 U.S.C. § 274(c)(2)(A).

[30] 47 U.S.C. § 274(c)(1)(B).

[31] Notice at ¶¶ 49-51.

[32] 47 U.S.C. § 274(i)(10).

venture.[33] The statute prohibits the joint venture, not the BOC, from using the BOC's name or marks.[34] To the extent the BOC is providing services to the joint venture, the BOC may use its own name and trade and service marks. The joint venture may also use, consistent with the Act, any marks held by the holding company or other affiliate not listed in the definition of a BOC contained in Section 3(4) of the 1996 Act. To the extent that a BOC is performing inbound telemarketing activities for the joint venture, it is bound by the provisions relating to such telemarketing in Section 274(c)(2)(A).

In addition, the language of the joint marketing restriction is very specific and cannot be read broadly to apply to entities other than those specified in the Act. That provision prohibits only the BOC from engaging in marketing activities "for or in conjunction with" an affiliate in connection with electronic publishing.[35] It does not prohibit the affiliate from marketing the BOC's services and products or acting as a single point of contact for the customer.[36] In that case, the affiliate is marketing for the BOC, an arrangement that is permitted by the statute, contrary to the suggestion in the Notice.[37] In addition, the provisions of Section 222 relating to customer proprietary network information ("CPNI") permit the affiliate to obtain

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[33] Notice at ¶¶ 49-51.

[34] 47 U.S.C. § 274(b)(6).

[35] 47 U.S.C. § 274(c)(1).

[36] Any agreement under which the BOC allows the affiliate to market its products and service would be filed with the Commission and made publicly available, pursuant to 47 U.S.C. § 274(b)(3)(B).

[37] Notice at ¶ 53.

CPNI relating to the service that it is marketing on behalf of the BOC, so long as it is not used to market another service without the customer's permission.[38]

The Notice also asks what constitutes a "teaming or business arrangements" as those terms are used in Section 274(c)(2)(B).[39] Those terms reasonably encompass a range of arrangements, including, but not be limited to, marketing proposals in which the BOC and the electronic publisher each prepares its portion of a joint bid to a customer. The joint proposal could be written or oral, and the presentations coordinated, but the representative of the BOC would market only the BOC's services and products, and the representative of the electronic publishing entity would market only that entity's services. Congress wanted to clarify that such teaming arrangements are not to be considered joint marketing, which is why it placed that provision under the Joint Marketing provisions of Section 274.[40] These provisions are self-executing, and no regulations are required. Nor are regulations or further clarification required regarding the electronic publishing joint venture provisions of the Act.[41]

Finally, the Commission asks whether the prohibition on common employees between the BOC and its separate affiliate[42] is consistent with the provision permitting joint

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[38] The scope of what constitutes a "service" for CPNI purposes is under consideration in CC Docket No. 96-115.

[39] Notice at ¶ 56.

[40] ***See id.*** at ¶ 57.

[41] ***See id.*** at ¶¶ 58-59.

[42] 47 U.S.C. § 274(b)(5)(A).

telemarketing and referral.[43] It is not necessary to have employees in common in order to engage in joint marketing. Instead, the employees of one entity, in this case the BOC, will be performing explicitly permitted inbound telemarketing or referral services for the separate affiliate. Under such arrangements, the BOC's employees are still employed and paid solely by the BOC and are not employees in common with the affiliate.

V. The Nondiscrimination Provisions of Section 274 Do Not Prohibit Volume and Other Discount Pricing Arrangements; Computer III Rules Are Redundant and Should Be Repealed.

The nondiscrimination provisions of Section 274(d) are complete and require no Commission regulations. To the extent the Commission nonetheless chooses to adopt regulations to implement these provisions, it should not adopt all of its tentative conclusions as to their proper interpretation.

In particular, the language providing that rates charged to a BOC's electronic publishing affiliate be no "higher on a per-unit basis that those charged for such services to any other electronic publisher"[44] does not prohibit volume discounts, as the Commission tentatively concludes.[45] The statutory language should reasonably be read as requiring that any volume and other discount arrangements that are made available to the BOC's electronic publishing affiliate must be available to its competitors at the same terms and conditions. If the particular pricing

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[43] Notice at ¶ 40, citing 47 U.S.C. § 274(c)(2)(A).

[44] 47 U.S.C. § 274(d).

[45] Notice at ¶ 67.

arrangements are not subject to tariff regulation, the transaction must be reduced to writing and made publicly available.[46] This requirement ensures that non-affiliated electronic publishers are made aware of any discount arrangements provided to its affiliate.[47]

This interpretation is consistent with the overall nondiscrimination requirement of Section 274(d) and ensures that all electronic publishers are treated equally. With the absence of resale and shared use restrictions, small publishers that cannot themselves use large volumes of service may share capacity with other publishers or with other users, or they may resell spare capacity. This interpretation would also fully prevent discrimination against the BOC's affiliate. The basic network services in question are likely generally-available offerings that the BOC provides under a variety of pricing plans. The BOC would be unable reasonably to restrict non-affiliated electronic publishers from availing themselves of discount pricing plans. There is no indication that Congress intended the BOC's electronic publishing affiliate to be prohibited from using pricing arrangements that are available to its competitors.

The Commission also should not adopt its tentative conclusion that existing Computer III and Open Network Architecture ("ONA") regulations should apply to electronic publishing to the extent that they are not inconsistent with Section 274.[48] Statutory provisions address all of the safeguards in Computer Inquiry III and ONA, making the Commission's rules redundant and unnecessary. In particular, Section 274's nondiscrimination and accounting/audit

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[46] ***See*** 47 U.S.C. § 274(b)(3)(B).

[47] The Commission properly concludes that services that are not otherwise subject to tariff regulation need not be tariffed. Notice at ¶ 67.

[48] ***Id.*** at ¶ 65.

provisions, coupled with other statutory language dealing with nondiscrimination and interconnection,[49] customer proprietary network information,[50] and network disclosure[51] provide all of the competitive protections of Computer Inquiry III and ONA. Rather than trying to determine whether or not its existing regulations are fully consistent with Section 274, however, the Commission should abandon Computer Inquiry III and ONA and rely on the statutory protections.

VI. Alarm Monitoring Does Not Include Basic Transmission Services, Billing, Agency, Marketing, or Other Compensation Arrangements.

The Commission correctly concludes that the term "alarm monitoring," as defined in the statute,[52] does not encompass the BOCs' basic transmission services that are used by alarm monitoring companies.[53] It should also find that, although resale of alarm monitoring services may constitute the "provision" of such services,[54] other arrangements cited in the Notice, such as billing and collection, sales agency, and marketing, are not within the statutory definition of

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[49] ***See e.g.,*** 47 U.S.C. § 251.

[50] 47 U.S.C. § 222.

[51] 47 U.S.C § 251(c)(5).

[52] 47 U.S.C. § 275(e).

[53] Notice at ¶ 69. Although Bell Atlantic currently offers tariffed basic transmission services that are used by non-affiliated alarm monitoring services, it is not, itself, engaged in provision of any such services that would be grandfathered under Section 275, as asked in the Notice at ¶ 70.

[54] ***See id.*** at ¶ 71.

alarm monitoring service. That definition is limited to the receipt of signals from the customer's premises and transmission of those signals to a remote monitoring center.[55] It does not on its face include incidental functions, such as those the Commission lists, that do not involve the actual receipt or transmission of signals.

VII. Additional Rules Are Unnecessary to Implement the Nondiscrimination Provisions of the Act Relating to Telemessaging.

Section 260 of the 1996 Act prohibits any local exchange carrier ("LEC") from subsidizing its telemessaging services from revenues obtained from telephone exchange services or exchange access and from discriminating in favor of its own telemessaging service.[56] As the Commission points out, this section does not distinguish between interLATA and intraLATA provision of telemessaging services,[57] and, therefore, its provisions apply to both.[58]

Computer Inquiry III and ONA rules are not needed to implement these statutory provisions for pure price cap companies. In a pure price cap environment, rates are divorced from costs, and the LEC would be unable to use revenues from regulated services to subsidize telemessaging operations. In addition, the nondiscrimination, interconnection, and unbundling

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[55] ***See*** 47 U.S.C. § 275(e).

[56] 47 U.S.C. § 260(a).

[57] Notice at ¶ 75.

[58] As shown in CC Docket No. 96-149, interLATA telemessaging services are those in which the LEC's own facilities, or those leased from others and resold, carry the customer's communications across LATA boundaries. ***Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934***, CC Docket No. 96-149, Comments of Bell Atlantic at A-4 to A-5 (filed Aug. 15, 1996).

requirements of Sections 251 and 202(a) fully protect against discrimination. Therefore, the Commission does not need either the provisions of Computer Inquiry III nor any new regulations to implement the provisions of Section 260.

VIII. There Is No Basis for Shifting the Burden of Proof in Complaints.

As Bell Atlantic demonstrated in its comments filed in the BOC In-Region NPRM,[59] it is neither necessary nor appropriate to shift to the BOCs the burden of proof in complaint proceedings, as suggested in the Notice.[60] Once a complainant presents a ***prima facie*** case by presenting facts and supporting evidence that show that a violation has occurred, the defendant already has the obligation to proffer evidence to refute the complainant's allegations.[61] Existing rules already provide a vehicle for a complainant to discover additional information that is under the BOC's exclusive control,[62] and no additional rules are needed. If the complainant can prove that the alleged behavior has occurred or will shortly occur, that it violates the Act and/or the Commission's Rules, and that it has or will cause substantial harm, the Commission may issue a cease and desist order under Sections 274(e)(2), 260(b) or 275(c).[63] If the violations

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[59] ***Id.*** at 9-11.

[60] Notice at ¶¶ 79, 82.

[61] Of course, the defendant may also present legal arguments showing that the behavior complained against is lawful.

[62] ***See*** 47 C.F.R. §§ 1.729-1.731.

[63] ***See*** Notice at ¶¶ 80, 84.

are found to be willful, the Commission and the states have authority to impose forfeitures to deter unlawful conduct.

Finally, the Commission asks what would constitute "material financial harm" that a complainant must demonstrate in order to perfect a complaint under Sections 260(c) and 275(c).[64] Because the materiality of any harm could vary widely depending on the size and capitalization of the complainant, the Commission should consider materiality based on the facts of each individual complaint. Under the statutory language, if the facts in the complaint are insufficient to show material financial harm, the complainant is not only not entitled to expedited review, as the Commission points out,[65] but the complaint does not meet the statutory standard and should be dismissed.

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[64] ***Id.*** at ¶ 83.

[65] ***Id.***

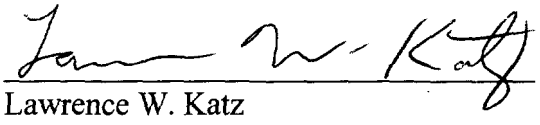
IX. Conclusion

The non-accounting provisions of the 1996 Act do not require any new Commission rules. However, the Commission should clarify certain provisions as discussed above.

Respectfully Submitted,

The Bell Atlantic Telephone Companies

By their Attorney



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September 4, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 1996 a copy of the foregoing "Comments of Bell Atlantic" was served on the parties on the attached list.

Tracey DeVaux

* Via hand delivery.

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